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IN THE COURT OF APPEALS OF INDIANA

KEN FRYAR BUILDINGS, INC,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A03-0605-CV-218
	)	
TGL DEVELOPMENT, L.L.C.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Robert W. Gilmore, Jr., Judge
Cause No. 46C01-0106-CP-208

January 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Ken Fryar Building, Inc. ("Fryar"), appeals following a bench trial in which the trial court entered judgment against Fryar and in favor of TGL Development, LLC ("TGL"), in the amount of $48,608.58. Fryar raises three issues, which we restate as: (1) whether the trial court properly found that Fryar breached the contract; (2) whether the trial court properly found that TGL suffered damages as a result of the breach; and (3) whether TGL's award should be reduced for failure to mitigate damages. TGL raises the additional issue of whether Fryar has waived all issues by failing to follow the rules of appellate procedure. Finding that Fryar substantially complied with the rules of appellate procedure, we address the merits of its appeal. However, we affirm, concluding that the evidence supports the trial court's judgment, and that the trial court's award of damages was proper and should not be reduced.

Facts and Procedural History

The facts most favorable to the decision below indicate that Fryar and TGL entered into a contract for the sale of real estate on February 21, 2000 (the "Contract"). This Contract was the result of events that began in 1999, when Ken Fryar, an architect and owner of Fryar, marketed for sale the fourth phase of a real estate development called Lakeside Glen, located in Michigan City, Indiana (the "Property"). Fryar had already completed the first three phases of the development. Ken Fryar provided TGL with an engineering plat drawing of the Property (the "Plan"). This Plan includes a depiction of a storm water drainage system (the "System") connected to the Property. At the time the parties entered into the Contract, however, Ken Fryar knew that the System was not installed as depicted on

the Plan. Ken Fryar also knew that TGL could not sell lots located on the Property until it received plat approval from the planning commission, and that TGL could not receive this approval without a properly installed drainage system. Dennis Leary and Thomas Thomas, owners of TGL, both testified that Ken Fryar had represented to them that they would not have to do any work on the Property with regard to its engineering and that the Property was as represented in the Plan, and that they did not know when they entered into the Contract that the System was not actually in place.

TGL learned roughly a month after entering into the Contract that the System was not actually in place. At this point, TGL realized that it could not receive final plat approval without the System, but decided to continue moving forward with the project. At a planning commission meeting in June 2000, TGL was informed that "final plat approval . . . will be conditioned upon the City Engineer approving the storm water drainage system." Appellant's Appendix at 838. TGL contacted Fryar and attempted to negotiate a solution through which Fryar would complete the System. In March 2001, TGL demanded, through its attorney, that Fryar promptly complete the necessary work on the System. Fryar did not comply with this demand, and TGL moved to rescind the Contract on May 9, 2001. In June, 2001, TGL listed the Property for sale. Fryar actually completed installing the System in 2002.

On June 24, 2001, TGL filed this suit against Fryar alleging various theories of breach of contract and fraud. After a bench trial, the trial court entered an order, stating in relevant part:

> [T]his Court finds that [Fryar], breached its' [sic] contractual duty with TGL Development under the Contract. Specifically, this Court finds that the Defendant violated Article IV (h) of the Contract[:] "Seller is aware of no facts that would restrict the ability of the Purchaser to obtain preliminary and final plat approval for the subdividing of the Property into residential lots." The Defendant breached this section of the Contract by representing that the storm drainage system was installed and that Plaintiff could immediately begin development. The drainage system was not installed and Plaintiff experienced valuable time and money delays as a result of Defendant's misrepresentation.

Appellant's App. at 6. The trial court then found that TGL's damages amounted to $48,608.58. This figure consists of: (1) $17,431.33 for the interest on TGL's mortgage loan from the time TGL purchased the Property until the System was actually installed; (2) $25,346.66 for attorney's fees, which were contemplated in the Contract; (3) $562.50 for insurance premiums; (4) $665.24 for real estate taxes; (5) $1,350 for the cost of additional engineering expenses; and (6) $3,152.50 for the loss of use of the initial $20,000 investment.[1]

Fryar now appeals. Additional facts will be included as necessary.

Discussion and Decision

I. Waiver

Before addressing the merits of Fryar's appeal, we address TGL's argument that Fryar has failed to comply with the rules of appellate procedure, and that we should therefore dismiss the appeal. "The appellant's Appendix shall contain . . . pleadings and other documents from the Clerk's Record . . . that are necessary for resolution of the issues raised on appeal." Ind. Appellate Rule 50(A)(2)(f). TGL argues that because Fryar has raised a claim of insufficient evidence, this rule requires it to provide this court with the complete trial record. Fryar's appendix includes the entire transcript and twenty of the exhibits. In

this case, we received a copy of the transcript and all of the exhibits, except for the nondocumentary and oversized exhibits, from the Clerk of the trial court, pursuant to the rules of appellate procedure. TGL cited one of the oversized exhibits in its brief, and included a scaled-down copy of this exhibit in its appendix. This exhibit is evidence favoring TGL, and Fryar could have provided us with this exhibit in light of the fact that it would not be included in the Clerk's record. However, other than this exhibit, all relevant evidence was included in either Fryar's appendix or the Clerk's record; indeed, we have two copies of virtually every piece of evidence. Fryar substantially complied with the rules of appellate procedure, and we find no evidence that its failure to provide us with a copy of the exhibit cited by TGL was in bad faith. We decline to accept TGL's argument that dismissal is warranted.[2]

II. Breach of Contract

Fryar argues that the trial court erred in three respects in finding that it breached the Contract. First, Fryar argues that the trial court improperly considered evidence outside the four corners of the contract in violation of the parol evidence rule. Second, Fryar argues that insufficient evidence exists to support the trial court's finding that Fryar breached the contract. Third, Fryar argues that insufficient evidence exists to support a finding that TGL reasonably relied upon Fryar's representations, and that therefore, the elements of fraud were not satisfied. We address each in turn.

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[1] According to our calculations, the total of these figures is actually $48,508.23.

[2] We also reiterate that we have a "preference to resolve cases that come before us on their merits where possible." Foley v. Manor, 844 N.E.2d 494, 496 (Ind. Ct. App. 2006). Also, "[a]ny party's failure to include any item in an Appendix shall not waive any issue or argument." Ind. Appellate Rule 49(B).

A. Parol Evidence[3]

Fryar asserts that the trial court erroneously considered parol evidence in construing the contract, which contained an integration clause.[4] "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence . . . of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." Dicen v. New Sesco, Inc., 839 N.E.2d 684, 688 (Ind. 2005) (emphasis added) (quoting Corbin on Contracts § 573 (2002 reprint)). Therefore, "[p]arol evidence may be considered if it is not being offered to vary the terms of the written contract, and to show that fraud, intentional misrepresentation, or mistake entered into the formation of a contract." America's Directories, Inc., v. Stellhorn One Hour Photo, Inc., 833 N.E.2d 1059, 1066 (Ind. Ct. App. 2005), trans. denied. "In addition, parol evidence may be considered to apply the terms of a contract to its subject matter." Krieg v. Hieber, 802 N.E.2d 938, 944 (Ind. Ct. App. 2004).

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[3] Fryar did not object at trial to the admission of much of the evidence it now complains the trial court erroneously considered. Fryar did not waive this issue, though, because "'[t]he parol evidence rule is a rule of preference and of substantive law which prohibits both the trial court and appellate court from considering such evidence even though it was admitted to trial without objection." Franklin v. White, 493 N.E.2d 161, 165-66 (Ind. 1986).

[4] The clause states:

> This Contract constitutes the complete and final expression of the Contract of the parties relating to the Property, and supersedes all previous Contracts, Contracts and understandings of the parties, either oral or written, relating to the Property. This Contract cannot be modified, or any of the terms hereof waived, except by an instrument in writing (referring specifically to this Contract) executed by the party against whom enforcement of the modification or waiver is sought.

Appellant's App. at 24.

Fryar argues that TGL introduced evidence regarding the System in an attempt to add a term to the Contract, thereby violating the integration clause.[5] We disagree. Article IV, section 4.1(h) of the Contract states: "Seller is aware of no facts that would restrict the ability of the Purchaser to obtain preliminary and final plat approval for the subdividing of the Property into residential lots." Appellant's App. at 18. By introducing evidence that Fryar was aware of facts that would restrict TGL from obtaining plat approval, TGL did not attempt to contradict or add to the terms of the contract. Instead, TGL introduced evidence so that the trial court could apply the terms of the provision to its subject matter, Fryar's awareness of facts. Indeed, we fail to see how the terms of this provision could be applied without consulting extrinsic evidence of Fryar's awareness of facts at that time. The trial court properly considered evidence indicating that Fryar was aware that the System was not installed at the time of the Contract, and we will consider such evidence in our review.

B. Sufficiency of Evidence to Support a Finding of Breach

[5] In its brief, Fryar supports this assertion with the citation "Appellant's App p. 44-854." Although in its reply brief Fryar provides some specific citations to the record, it uses these citations to support the general statement that "TGL presented substantial evidence of events that occurred before the execution of the [Contract]." Appellant's Reply Brief at 8-9. Fryar does not explain why the testimony it cites violates the parol evidence rule. If Fryar is arguing that the parol evidence rule bars all evidence relating to any event that occurred before the formation of a contract, it misstates the rule. We remind Fryar that its argument "must contain [its] contentions on the issues presented, support by cogent reasoning, and each contention must be supported by citations to the authorities, statutes, and the appendix or parts of the record relied on." Masonic Temple Ass'n of Crawfordsville v. Ind. Farmers Mut. Ins. Co., 837 N.E.2d 1032, 1037 (Ind. Ct. App. 2005); see Olcott Int'l & Co., Inc. v. Micro Data Base Sys., Inc., 793 N.E.2d 1063, 1068 n.1 (Ind. Ct. App. 2003), trans. denied (appellant waived issue of fraud by failing to "explain how [appellee's] alleged bad faith conduct satisfied [the elements]"). Fryar also supports a statement in its reply brief with the citation "Appellant's App. p. 44-780." Just as we do not undertake the burden of developing a party's arguments, we will not undertake the burden of searching through over seven hundred pages of testimony to find support for a party's statement. See, e.g., Hall v. State, 837 N.E.2d 159, 160 (Ind. Ct. App. 2005), trans. denied ("This court will not undertake the burden of developing an argument on behalf of a party on appeal."); Wright v. Wright, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002). Nevertheless, we will address the merits of Fryar's arguments.

In this case, although the parties did not request or submit findings of fact and conclusions of law, the trial entered findings of fact and law sua sponte. When a trial court does so, we apply a two-tiered standard of review: (1) whether the evidence supports the findings; and (2) whether the findings support the judgment. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). Sua sponte findings control only those issues covered by the findings. Butler Univ. v. Estate of Verdak, 815 N.E.2d 185, 190 (Ind. Ct. App. 2004). For issues not covered by findings, we employ a general judgment standard of review. Id. Under this standard, we will affirm the judgment on any legal theory supported by the evidence. Id. at 190-91. When reviewing the trial court's decision, we recognize that it had the opportunity to observe the witnesses, and we will not assess witness credibility or otherwise reweigh the evidence on appeal. Olcott, 793 N.E.2d at 1071. Instead, we will consider only evidence and the reasonable inferences therefrom that are favorable to the judgment. Id.

Here, the trial court's order indicated that it found Fryar had violated Article IV 4.1(h) of the Contract: "Seller is aware of no facts that would restrict the ability of the Purchaser to obtain preliminary and final plat approval for the subdividing of the Property into residential lots." Appellant's App. at 6. It went on to find that Fryar had represented that the System was installed and that TGL could immediately begin development, but that the System was not installed and TGL suffered damages because it could not immediately begin development. Id.

Evidence was introduced at trial that, at the time Fryar entered into the Contract, Fryar had not installed the System. Ken Fryar himself testified that the System was not actually in place until roughly two years after Fryar entered into the Contract. Id. at 697-98. Evidence

was also introduced at trial that Fryar was aware that TGL could not get final plat approval until the System was installed. Ken Fryar testified that in his deposition he stated: "TGL could not get their final approval until we had this system in place." Id. at 697. This evidence is sufficient to support the trial court's finding that Fryar knew of a fact that would restrict TGL from obtaining final plat approval and the trial court's judgment that Fryar thereby breached Article IV (h) of the Contract.

Fryar argues that insufficient evidence exists to support a finding that it had a duty to install the System. However, the trial court's ruling does not include a finding that Fryar had a duty to install the System. The trial court found that Fryar breached the Contract by "representing that the storm drainage system was installed." Appellant's App. at 6 (emphasis added). Had Fryar not been aware that the System was not installed, or that TGL could not get plat approval without the System, absent some independent agreement, Fryar would not have breached the Contract by failing to install the System. Cf. City of Indianapolis v. Twin Lakes Enter., Inc., 568 N.E.2d 1073, 1077-78 (Ind. Ct. App. 1991), trans. denied (plaintiff did not waive its right to sue for breach of contract because although plaintiff knew about certain conditions when it agreed to modify the original contract, it did not know about the defendant's previous knowledge of and silence regarding these conditions). In other words, it was not Fryar's failure to have the System installed at the time of the Contract that constitutes the breach. Instead, the breach occurred because Fryar entered into the Contract aware that the System was not installed and that TGL could not obtain final plat approval without the System.

Fryar then argues that evidence supports a finding that TGL knew or should have

known that the System was not installed when they entered into the Contract. Fryar does not explain why TGL's constructive knowledge that the System was not installed would excuse Fryar's breach. We assume that Fryar is making some sort of waiver argument. See Salcedo v. Toepp, 696 N.E.2d 426, 435 (Ind. Ct. App. 1998) (stating that a party may waive a beneficial contractual provision through its conduct, and that after having waived the condition, the party may not bring a claim for failure to perform that condition). However, Fryar does not articulate such an argument or support it with citations to authority. See supra, note 4. Regardless, in arguing that TGL knew or should have known that the System was not installed, Fryar is asking us to reweigh the evidence. We decline the invitation to do so.

Evidence was introduced at trial that Fryar had represented to TGL that the System was installed. Evidence was introduced at trial that Fryar gave the Plan depicting the System to a real estate broker, who subsequently gave the Plan to TGL.[6] See Appellee's Appendix at 122; see also Appellant's App. at 569 (architect testifying that the Plan depicts the System); id. at 597 (architect marking on plan portions of System that were actually installed).[7] Thomas testified that Fryar never informed him that the System, as depicted in the Plan, had not actually been installed. Appellant's App. at 119. Evidence also included a memo from Fryar to TGL stating: "[a]ll engineering work for the streets, curbs, gutters, sidewalks and

[6] This was an over-sized exhibit, and was therefore not included in the Clerk's record. Fryar did not include this exhibit in its appendix. However, TGL included a scaled-down copy of the exhibit in its appendix.

[7] The architect highlighted the System as depicted on the Plan in yellow, and the portions of the System actually installed at the time of a 2000 inspection in blue. Virtually none of the System as depicted on the Plan was actually installed at the time of the inspection.

sewers has been done and will be given to the buyer." Id. at 814. Thomas testified that Fryar represented that the project was "a turn key, everything [was] done on it as was proposed to us, engineering work, preliminary plat approval," and that TGL "would just need to get going with [its] contractors, give [them] the prints and get the work done so [it] can start executing the work." Id. at 116. Leary also testified that Fryar represented to TGL that the Property was, "as we can see by the plans, tying into a storm drainage system." Id. at 309. Both Thomas and Leary testified that they did not learn that the System was not actually installed until after they had entered into the Contract. See id. at 119 (Thomas testifying that Fryar never informed TGL that the System depicted on the Plan was not actually installed); id. at 121 (Thomas testifying that there is a storm drainage system running along the east side of the property, but that he later learned that this drainage system belonged to the adjoining property); id. at 272 (Leary testifying that "we felt that upon closing we would be able to tie into a previously constructed drain system"). Although Fryar cites testimony and other evidence that could support a finding that TGL should have known that the System was not installed, we do not reweigh evidence on appeal, but consider only that evidence favorable to the judgment. We conclude that substantial evidence of probative value supports a conclusion that TGL did not know that the System was not installed.

The evidence supports the trial court's findings that Fryar represented to TGL that the System was installed, that the System was not installed, and that Fryar knew that TGL could not obtain final plat approval without the System. These findings support the trial court's judgment that Fryar breached the Contract.

D. Fraud

Fryar argues that "[r]eliance on Fryar was unreasonable and TGL failed to meet its burden in proving fraud." Appellant's Brief at 16. However, although TGL's complaint contains allegations of fraud, see appellant's app. at 10, the trial court's judgment did not include or require a finding of fraud. Therefore, the issue of whether or not the evidence supports a finding of fraud is irrelevant.

Even if reasonable reliance is a required element, sufficient evidence exists to support a finding of reasonable reliance. When examining a party's reliance, we look both at the fact of reliance and the right of reliance. Roberts v. Agricredit Acceptance Corp., 764 N.E.2d 776, 779 (Ind. Ct. App. 2002). Fryar does not argue that TGL did not in fact rely upon Fryar's misrepresentation, but argues only that TGL had no right of reliance, i.e., that TGL's reliance was unreasonable.

If the evidence could support multiple interpretations, whether one's reliance upon another's misrepresentation was reasonable is a question of fact. Ruff v. Charter Behavioral Health Sys. of N.W. Ind., Inc., 699 N.E.2d 1171, 1175 (Ind. Ct. App. 1998), trans. denied. The reasonableness of reliance is a question of law only if the evidence "is susceptible to only one interpretation." Wright v. Pennamped, 657 N.E.2d 1223, 1231 (Ind. Ct. App. 1995), decision clarified on denial of rehearing, 664 N.E.2d 394 (Ind. Ct. App. 1996). With regard to the right of reliance, "where persons stand mentally on equal footing, and in no fiduciary relation, the law will not protect one who fails to exercise common sense and judgment." Ruff, 699 N.E.2d at 1175. "However, the requirement of reasonable prudence in business transactions is not carried to the extent that the law will ignore an intentional fraud practiced on the unwary. A person has a right to rely upon representations where the

exercise of reasonable prudence does not dictate otherwise." Wright, 657 N.E.2d at 1231. Here, after viewing the Plan depicting the System, TGL representatives inspected the Property. Evidence was introduced that an open ditch drainage system ran alongside the Property, near where the System is depicted in the Plan. Although this drainage system in fact belonged to another piece of property, a reasonable interpretation of the facts is that this drainage system appeared to belong to the Property. Based on the facts that TGL had no reason to distrust Fryar and that representatives viewed a drainage system in roughly the same place as depicted in the Plan, we cannot say that, as a matter of law, it was unreasonable for TGL to rely on Fryar's representation that Fryar knew of no fact that would restrict TGL from obtaining plat approval. This is not to say that TGL could not have been more diligent in ascertaining the validity of the Plans. However, for our standard of review, it is enough for us to conclude that sufficient evidence exists to support a finding that TGL's reliance was reasonable.

III. Damages

A. Standard of Review

We use a limited standard of review in cases challenging a trial court's award of damages. Whitaker v. Brunner, 814 N.E.2d 288, 296 (Ind. Ct. App. 2004), trans. denied. Recognizing that the trial court is in a better position than we are to observe the witnesses, we will not judge witness credibility or otherwise reweigh the evidence. Id. We will consider only that evidence favorable to the trial court's award. Id. However, "[t]he damage award cannot be based on speculation, conjecture, or surmise, and must be supported by probative evidence." Id. "When injured by a breach of contract, a party's recovery is limited

to the loss actually suffered." Id. The trial court's award of damages will be reversed only if it is not within the scope of the evidence. Id.

B. Trial Court's Award of Damages[8]

Fryar first argues that because TGL did not immediately move to rescind the Contract, and instead waited for a little over a year to take legal action, we should find that TGL waived its right to any damages caused by Fryar's breach. Again, Fryar has failed to cite any authority supporting its argument that TGL has "waived" its right to damages. See supra, note 4. Instead of treating the argument as waived, we will address Fryar's waiver argument in conjunction with its arguments that TGL: (1) was not damaged; and (2) failed to mitigate damages.

1. Damage to TGL

Fryar's argument that TGL was either not harmed by the breach or forfeited its right to damages because it did not immediately repudiate the contract is without merit. It has long been the common law of Indiana that "where there has been a breach of warranty, a rescission of the contract is not the only remedy of the purchaser." Love v. Oldham, 22 Ind. 51, 1864 WL 1901 at *1 (1864). Indeed, our common law has traditionally advanced public policy by encouraging parties to negotiate and seek fulfillment of contractual arrangements before resorting to repudiating a contract or suing for breach. See Cree v. Sherfy, 138 Ind. 354, 37 N.E. 787, 788 (1894) ("[I]n causes of action arising ex contractu, it is ordinarily necessary that a demand be made upon the party who is bound to discharge the obligation or

[8] In its reply brief, Fryar concedes, "[a]bsent issues involving mitigation of damages, Fryar recognizes that if TGL was damaged, the trial court's calculation would have been appropriate." Appellant's Reply Brief

perform the contract. The legitimate object of a demand is to enable the party to perform his contract or discharge his liability, agreeably to the nature of it, without a suit at law."); cf. Dept. of Local Gov't Fin. v. Commonwealth Edison Co. of Ind., Inc., 820 N.E.2d 1222, 1227 (Ind. 2005) (noting that "[t]he law encourages parties to engage in settlement negotiations in several ways"); Orto v. Jackson, 413 N.E.2d 273, 276 (Ind. Ct. App. 1980) (policy reasons for requiring homeowners to give notice of breach of implied warrant of habitability include allowing builder to cure breach, reducing builder's damages, and encouraging settlements). "Since it is the policy of the law to favor and encourage the compromise of differences, one who makes an unsuccessful effort toward that end should not be penalized." Ind. Ins. Co. v. Handlon, 216 Ind. 442, 447, 24 N.E.2d 1003, 1005 (1939).

Here, after discovering that the System was not implemented on the Property in the manner represented, TGL contacted Fryar and set up meetings with Fryar, the planning department, and the city engineer, and "let [Fryar] know [TGL] still wanted to move forward, but we needed to get his project completed to where we can tie into the system." Appellant's App. at 165. In September, 2000, Fryar represented that it was working on some new plans to get a System in place, and estimated that it would get the plans to TGL in a month. Id. at 175. However, Fryar did not deliver these plans. Thomas testified that TGL continued to communicate with Fryar throughout the remainder of 2000 and January, 2001, about Fryar's plans for installing a System. Id. at 175-77. On February 5, 2001, TGL sent Fryar a letter requesting documentation of Fryar's plans regarding the System. Exhibit 34. On March 6, 2001, TGL's attorney sent Fryar a letter demanding that Fryar complete the System by March

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at 11. Therefore, we will not discuss the trial court's actual calculations.

31, 2001. Exhibit 35. The evidence clearly indicates that after discovering Fryar's breach, TGL made efforts to salvage the Contract and avoid going to court. As public policy encourages parties to resolve contractual disputes without resort to the legal system, we will hardly penalize TGL by holding that, through its attempts to salvage the bargain and encourage Fryar to remedy the breach, it waived its rights to sue for damages caused by the breach. See Bowmar Instrument Corp. v. Allied Research Assoc., Inc., 181 Ind. App. 514, 518-19, 392 N.E.2d 825, 828 (1979) (fact the general contractor did not place subcontractor in default and instead repeatedly requested performance did not amount to waiver of subcontractor's breach because "defaulting [the subcontractor] was not a commercially reasonable alternative").

Fryar also argues that TGL was not harmed by the breach because "TGL was never in position to connect to the [System]." Appellant's Rep. Br. at 13. Apparently, Fryar is thereby arguing that upon discovering the breach, in order to be entitled to damages, TGL must have either: (1) immediately rescinded the contract; or (2) proceeded as if the breach had not occurred and entered into various contracts to have work completed on sidewalks, curbs, sewers, and streets before receiving any assurance that Fryar would actually act on its representations that it would complete work on the System. We disagree, and conclude that TGL's course of action was reasonable given the circumstances. Upon discovering a breach, a party will naturally be wary of the breaching party's verbal assurances that it will cure the breach. Had Fryar taken some affirmative act by which TGL could have reasonably been assured that Fryar would install the System, TGL's course of action may be viewed with more skepticism. However, we do not think it reasonable to require TGL to rely on Fryar's

mere verbal assurance after TGL has just learned of Fryar's breach of contract, especially as this breach involved a misrepresentation.

Sufficient evidence exists for the trial court to have determined that TGL was damaged by Fryar's breach.

2. Mitigation of Damages

Failure to mitigate damages is not a defense to liability, but is a defense that may reduce the amount of damages a party may recover. Foster v. Owens, 844 N.E.2d 216, 221 (Ind. Ct. App. 2006), trans. denied. "[T]he obligation of a plaintiff to mitigate damages customarily refers to the expectation that a person injured should act to minimize damages after an injury-producing incident." Kocher v. Getz, 824 N.E.2d 671, 674 (Ind. 2005). In order to succeed on the defense of failure to mitigate damages, a defendant must satisfy two elements: (1) "the plaintiff failed to exercise reasonable care to mitigate his or her post-injury damages"; and (2) "the plaintiff's failure to exercise reasonable care caused the plaintiff to suffer an identifiable item of harm not attributable to the defendant's negligent conduct." Foster, 844 N.E.2d at 221.

Fryar's claim relating to TGL's alleged failure to exercise reasonable care in mitigating damages involves the same basic arguments it used in arguing that TGL was not damaged. See Appellant's Reply Brief at 13-14 (arguing that TGL did not mitigate damages because it neither immediately rescinded the contract nor made adequate attempts to proceed with the project). As discussed above, TGL's actions following the breach were reasonable. TGL was not, as Fryar argues, required to either immediately rescind the Contract or proceed in complete reliance on Fryar's assurances that he would install the System. TGL's attempts

to negotiate with Fryar were reasonable and do not appear to be merely a tactic to increase a damage award. After it became apparent that Fryar was not going to install the System within an acceptable period of time, TGL resorted to the courts. We conclude Fryar has failed to show that TGL acted unreasonably, and has therefore failed to satisfy the first element of the failure to mitigate damages defense. Because Fryar has failed to satisfy this first element, we do not address the issue of whether Fryar has shown some particular and identifiable harm suffered. We conclude that reduction of TGL's damages is not warranted.

Conclusion

We conclude that the trial court acted within its discretion in determining that Fryar breached the Contract. We also conclude that the trial court's award of damages was proper.

Affirmed.

BARNES, J., concurs.

SULLIVAN, J., concurs with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

KEN FRYAR BUILDINGS, INC.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A03-0605-CV-218
	)	
TGL DEVELOPMENT, L.L.C.,	)	
	)	
Appellee-Plaintiff.	)	

SULLIVAN, Judge, concurring

I concur but write separately with respect to Part II D. Fraud.

A misrepresentation by one of the parties to a contract, as contained in a specific provision of the contract, may be grounds for avoiding the contract; or such misrepresentation may entitle the injured party to pursue an action for damages. Pugh's IGA, Inc. v. Super Food Services, Inc., 531 N.E.2d 1194, 1198 (Ind. Ct. App. 1988) (quoting Frenzel v. Miller, 37 Ind. 1, 17, (1871)), trans. denied.

Conversely, the party accused of making the misrepresentation is permitted to demonstrate that the misrepresentation, even if made, was not entitled to be relied upon by the complaining party. Roberts v. Agricredit Acceptance Corp., 764 N.E.2d 776 (Ind. Ct. App. 2002). In this event, of course, the misrepresentation/lack of reliance issue may well be determinative as to whether the contract was in fact breached by reason of the misrepresentation.

Even given the viability of a lack of reasonable reliance claim in the case before us, a reasonable jury would undoubtedly conclude that the breach defect, i.e., that the sewer system was not in place, could not have been discovered by TGL. This is because, under the circumstances, a reasonable purchaser could only be expected to observe what was visually apparent. The defect in question could only have been discerned by an extensive and expert investigation which would necessitate excavation and related efforts. Accordingly, in my view, a jury would necessarily conclude that not only did TGL rely upon the representation contained in the contract itself, but that it had the right to so rely and that such reliance was reasonable under the circumstances.

For these reasons I would hold that as a matter of law Fryar's claim of unreasonable reliance by TGL is without merit.